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Supreme Court, U.S.
FILED

No. 001846 FEB 14 2000

IN THE

SUPREME COURT OF THE UNITED STATES

JAIME HUESCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari
To The United States Court of
Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

On May 11, 1998 Defendant Jaime Huesca presented a Motion to Suppress which was essentially based on the absence of reasonable suspicion that might have justified the arrest or detention of the Defendant. Reasonable suspicion of criminal activity must be based upon specific facts which taken together with rational inferences therefrom, reasonably warrant an intrusion (**United States v. Cardenas,** 9 Fed. 3rd, 1139,1153).

So, did the trial court err in denying the Motion to Suppress when the same was based on the absence of reasonable suspicion, reasonable suspicion which is required to conclude whether the search and seizure was a legal one, and its absence did not justify a search and seizure, and for that reason, should the Honorable Judge have ordered the suppression of all evidence.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court below were defendant-petitioner **JAIME HUESCA**, who appeared before the **HONORABLE ORLANDO L. GARCIA**., District Court Judge for the Western District of Texas, San Antonio Division. **ANGELA RABA**, Assistant U.S. Attorney, Western District of Texas, represented appellee in the district court proceedings. **R. CLARK ADAMS**, from the Public Defender's Office, represented appellant in the district court proceedings. **JUAN LUIS BURGOS-GANDIA** is the Counsel who represented appellant on appeal.

Respondent, the United States of America, is represented by **JOSEPH H. GAY, JR.**, Assistant United States Attorney for the Western District of Texas.

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IN THE

SUPREME COURT OF THE UNITED STATES

JAIME HUESCA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed October 21, 1999.

OPINIONS BELOW

The memorandum of opinion of the Court of Appeals is captioned **United States v. Jaime Huesca,** No. 99-50127 (5th Cir. Oct. 21, 1999). The opinion of the Court of Appeals is attached as Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on October 21, 1999 (see appendix A). This Court's jurisdiction is invoked under Title 28, United States Code, §1254(1).

The United States District Court, Western District of Texas, San Antonio Division, exercised jurisdiction pursuant to Title 18, United States Code §3291. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to Title 28, United States Code §1291 and also pursuant to Title 18, United States Code §3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented in this petition require consideration and application of the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Proceedings Below

On April 15, 1998 Jaime Huesca was indicted in a five (5) count indictment. Mr. Huesca was charged in Count 1 with a violation of Title 8 USC Section 1324(a)(1)(A)(ii) and in violation of Title 8 USC Section 1324(a)(1)(A)(5)(I); in Count 2, for a violation of 8 USC Section

1324(a)(1)(A)(ii) and 18 USC Section 2; Counts 3, 4, and 5, for a violation of 8 USC Section 1324 (a)(1)(A)(ii) and 18 USC Section 2.

On May 11, 1998 Mr. Huesca filed a Motion to Suppress Evidence questioning his detention and/or arrest by Government officials because the elements and/or factors that they had before them did not justify a conclusion of reasonable suspicion. Specifically, the factors that they had before them at the time of the detention or arrest which were the following:

(1) The method of travel on Highway 85
(2) The time at night
(3) The numerous smuggling loads that have been apprehended in that area in the 30 days
(4) An increase of rental vehicles being used as smuggling vehicles in those 30 days
(5) Truck appeared to be similar to the truck going in the westerly direction, specifically, the same size, color, frame and Ohio plates
(6) The person driving the vehicle was clean cut, Hispanic male, light colored shirt

These factors above mentioned did not create reasonable suspicion as defined in the case of **US v. Cardenas,** 9 Fed. 3rd 1139, because they did not create a particularized and objective basis for suspecting the particular person of smuggling contraband. The Motion to Suppress was denied on August 18, 1998 by Honorable Judge Orlando L. Garcia.

On January 22, 1999 Petitioner Huesca was convicted of Count 2 of the Indictment. The judgment was entered on February 18, 1999. The Respondent was sentenced to 12 months and 1 day of imprisonment. On direct appeal to the

Fifth Circuit Court of Appeals, the holding of the district court was affirmed.

B. Statement of the Facts

On March 18, 1999, Border Patrol Agents Ramon Armendariz and Bradford Corkins were monitoring traffic in a marked vehicle along Highway 85, four miles west of the town of Dilley, Texas. At about 4:30 a.m., the agents saw a Penske rental truck pass by, heading westbound on the highway. The truck appeared to be unloaded since the trailer bed was riding high. It was driven by a Hispanic male and bore out-of-state tags. Forty-five minutes later, the agents again noticed the same truck heading the opposite direction, this time appearing to be heavily loaded. The same driver was visible in the cab. As the truck approached, the agents flashed on the headlights of their patrol vehicle to illuminate the truck, but the driver did not turn to look at the patrol car. The agents then pulled out and followed the truck for a short distance, noticing that it swayed as if fully loaded. Agent Corkins decided to conduct an immigration inspection. He activated the patrol vehicle's emergency lights, but the truck did not stop for at least one mile. Mr. Huesca's vehicle was approximately 84 miles from the United States border when it was stopped by the Border Patrol agents, and there was no indication that Huesca had just come from the border.

REASONS FOR GRANTING THE WRIT

On May 11, 1998, respondent Huesca files a Motion to Suppress Evidence based upon a warrantless search realized without probable cause. The Motion to Suppress Evidence was denied by Honorable Judge Orlando L. Garcia on August 18, 1998.

The denial of the Motion to Suppress was maintained for appeal purposes by the respondent in this case.

Under the Fourth Amendment Exclusionary Rule, evidence obtained as a result of an illegal search and seizure **is not admissible** in proceedings against an accused (**State v. Fisher**, 141 Ariz. 227; **State v. Anderson**, 286 Ark. 58; **State v. Johnson**, 110 Idaho 516; **Hall v. US**, 148 App.D.C. 42; **Lorenzana v. Superior Court of Los Angeles County**, 511 P2d 33) where a timely application is made to suppress or exclude the evidence (**Weeks v. United States**, 232 US 383). This rule prohibits introduction into evidence of tangible materials seized during an unlawful search, testimony concerning knowledge acquired during an unlawful search, and derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint (**Murray v. United States**, 487 US 533) while arriving at the truth is a fundamental goal of the American Legal System, without the exclusionary rule the constitutional guarantee against unreasonable searches and seizures would be a mere forum of words (**James v. Illinois**, 493 US 307).

a) In the case of Mr. Huesca, there was no reasonable or articulate suspicion that Defendant was committing an offense, but even if there were, the same alone was insufficient. In the case of **Florida v. Royer**, 460 US 491, it is stated that reasonable suspicion of crime is insufficient to justify custodial interrogation, even if interrogation is investigative. In this case, this doctrine would apply even more, since the seizure of the respondent had no reasonable suspicion basis.

b) The Officers did not have a "Terry" temporary detention. The defendant, by using his Hispanic name did not create the justifiable suspicion that might have justified a temporary detention. In the case of **Terry v. Ohio**, 392 US 1, the Court decided that courts have responsibility to guard against Police conduct which is overbearing or harassing, or

which trenches over personal security without objective evidentiary justification which the Constitution requires, and when such conduct is identified, it must be condemned by judiciary, and the fruits must be excluded from evidence in the criminal trial.

c) Mr. Huesca, at the moment of being stopped by the US Border Patrol, gave his consent for the inspection of the vehicle he was driving. The US Border Patrol inspected the vehicle after respondent Huesca identified himself as a Resident Alien. Agent Corkins decided to conduct an immigration inspection by activating the patrol vehicles emergency lights. Agent Corkins identified himself as a Border Patrol Officer and he and Agent Armendariz were in uniform and under their authority after having stopped the vehicle and detained and/or arrested Mr. Huesca, inspected the rear of the truck with the alleged permission of Mr. Huesca. Mr. Huesca opened the rear hatch of the truck at the request of the agents. The hatch was open all the way exposing 25 persons stowed behind the boxes. (R-1:70) The consent given by respondent Huesca was not voluntary because of the six factors present in **US v. Ruigomez**, 702 Fed 2^{d} 61; **US v. Kelly,** 981 Fed 2nd 1464; wherein the Court considered six factors when evaluating the voluntariness of consent.

The first factor was Huesca' custodial status, which clearly was the case because he was under the custody of US Border Patrol at that time.

The second factor the Court considers is the presence of coercive police procedures, factor which was also present in this case because Mr. Huesca was stopped by US Border Patrol Officers who then inspected the truck and proceeded to inspect the same.

The third factor is the extent and level of the respondent's cooperation with the authorities. The respondent is a native of Mexico, so that the respondent's cooperation mainly responded to the showing of authority by

the US Border Patrol, who identified themselves as US Border Patrol Officers, to whom the respondent submitted rather than voluntarily cooperating with them.

The fourth factor being the respondent's awareness to refuse consent. During the course of the inspection, the respondent was never issued his Miranda Warnings, nor was he informed or aware of his rights to refuse consent. To the contrary, the Officers proceeded to inspect the vehicle without alerting the defendant of his right to refuse.

The fifth factor, respondent's education and intelligence. The respondent does not possess a significant degree of education to justify his understanding of the things that were transpiring at the time of his detention.

The sixth factor, respondent's belief that no incriminating evidence would be found. There's nothing in the record to show that Mr. Huesca knew of the contents that were in the rear of the truck that he was driving. Mr. Huesca specifically abide with the agent's request to inspect the rear of the truck he was driving and he personally opened the rear hatch of the truck and only boxes were visible. It was only after Border Patrol Agent Corkins opened the hatch all the way up that Huesca complied exposing 25 persons stowed behind the boxes. This factor is supported by the record in this case, which shows that the defendant did not have any knowledge about the contraband that was found by the US Border Patrol Officers when they inspected the back of the truck.

Analyzing the above factors, we can also conclude that even if the respondent gave his consent for the inspection of the vehicle, he did it under duress, because the same was given after he was stopped by Border Patrol Officers who identified themselves as Border Patrol Officers.

In this case, the US Border Patrol Officers' actions should be considered *ultra vires* because they did not have any justifiable suspicion, nor did they possess any evidence to justify the exercise of their discretion. The factors

considered by the agents which are specified supra did not justify the stopping of the vehicle nor the detention or arrest of the respondent. In this case, the officers exceeded their authority by, on their own initiative, lacking the legal elements that justify a detention. In other words, the factors present and available to those officers did not substantiate a conclusion of justifiable suspicion (**Reed v State of Georgia,** 448 US 438; **Brown v. State of Texas,** 443 US 47).

In the case of **USA v. Rivas,** 96-10302 (5th Circuit), the Fifth Circuit Court of Appeals decided that drilling into the body of a car at a border stop is not a routine search.

" Warrantless searches and seizures are unreasonable per se unless they fall within a few narrowly defined exceptions." **United States v. Cardenas**, 9 F.3d 1139, 1147 (5th Cir. 1993).The border-search doctrine is one of those exception. Id. Under the border-search doctrine, government agents may conduct a "routine search" at the international border or its functional equivalent without probable cause, a warrant, or any suspicion to justify the search. Id. At 1147-48. "Routine searches" are generally classified as those which do not "seriously invade a traveler's privacy." Id. At 1148 n.3. A stop and search that is not "routine" requires a "reasonable suspicion of wrongdoing to pass constitutional muster." Id. (internal quotations and citation omitted). Reasonable suspicion of criminal activity must be based upon "specific facts which, taken together with rational inferences therefrom, reasonably warrant an intrusion." Id. At 1153. Reasonable suspicion is defined as "a particularized and objective basis for suspecting the particular person" of smuggling contraband. **United States v. Montoya de Hernandez**, 473 US 531-541 (1985) (internal quotation and citation omitted). In determining whether government agents possessed a reasonable suspicion that criminal activity was occurring, we must consider "the totality of the particular circumstances." **Cardenas**, 9 F.3d at 1148 9 (internal quotations and citation omitted).

The Honorable Fifth Circuit Court of Appeals among its conclusions determines that the Petitioner was stopped by Border Patrol Officers 84 miles inside the United States. This stop was unreasonable because there could not be any reasonable suspicion once the Respondent was inside the United States at such a distance from the border. United States Border Patrol Officers should have stopped the respondent at the immediate surroundings of the United States border.

CONCLUSION

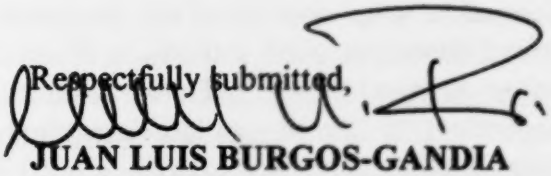
In accordance with the Fourth Amendment of the Constitution which states the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized; in accordance with the evidence, considering that in this case an illegal and warrantless search and seizure was performed by the Officers, which under the "Silver Platter Doctrine" bind the Federal Government, the evidence of all tangible materials seized during the unlawful search, inclusive, but not exclusive, the testimony concerning knowledge acquired during the unlawful search, and all derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is, or has been, otherwise acquired as an indirect result of the unlawful search performed, should be suppressed in this case.

Additionally, the search in this case was conducted eighty four (84) miles from the United States border; clearly not at an international border or its equivalent and for that reason, could not be construed as a "routine search".

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,



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Filed October 21, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50127
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAIME HUESCA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before POLITZ, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Jaime Huesca argues that the district court erred by denying his motion to suppress because the facts presented at the suppression hearing show that the U.S. Border Patrol agents did not have a reasonable suspicion

to support the stop of Huesca's vehicle. In the context of the denial of a motion To suppress, we review the district court's factual findings for clear error and the ultimate conclusion, that the facts supported a reasonable suspicion sufficient to justify an investigatory stop, de novo. United States v. Inocencio, 40 F. 3d 716, 721 (5th Cir. 1994).

A roving Border Patrol agent may stop a vehicle if the agent's observations lead him reasonably to suspect that the occupants of a particular vehicle may be involved in criminal activity. See United States v. Brignoni-Ponce, 422 us 873, 881 (1975). The factors to be taken into account in determining whether "reasonable suspicion" exists, include: the characteristics of the area; its proximity to the border; the usual patterns of traffic on a particular road and previous experience with alien traffic on a particular road and previous experience with alien traffic; information about recent illegal border crossings; the driver's behavior; and the vehicle's appearance, including the type of vehicle, appearance of being heavily loaded, number of passengers, and the passenger's behavior. Id. At 884-885.

Huesca's vehicle was approximately 84 miles from the U.S. border when it was stopped by the Border Patrol agents, and there was no indication that Huesca had just come from the border. All other facts articulated by the Border Patrol agents at the suppression hearing, however, indicate that the remaining factors support the existence of a reasonable suspicion to stop Huesca's vehicle. The district court did not err in concluding that all the discrete facts, when considered together, supported the stop. See United States v. Aldaco, 168 F. 3d 148, 150 (5th Cir. 1999).

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent, except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Huesca also contends that his consent for the agents to search his vehicle was not voluntarily given. This is an issue of fact that Huesca has raised for the first time on appeal. See United States v. Cooper, 43 F. 3d. 140, 144 (5th Cir. 1995)(voluntariness of consent is a question of fact). As such, this issue is subject to plain error review; and an issue of fact capable of resolution by the district court can never constitute plain error. See United States v. Lopez, 923 f. 2d 47, 50 (5th Cir. 1991). This issue is therefore foreclosed on appeal.

Consideration of this issue is alternatively precluded on appeal because Huesca failed to argue it in his motions to suppress and, in his plea agreement, waived his right to appeal all issues except those raised in his motions to suppress. See United States v. Melancon, 972 f. 2d 566, 568 (5th Cir. 1992)(defendant may waive his statutory right to appeal in a valid plea agreement if the waiver is knowing and voluntary).

AFFIRMED.